INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Constitutional provisions involved	3
Statement of the case	4
Raising the federal constitutional question	14
Reasons for granting the writ	19
1. The decision below raises an important and novel constitutional problem, of concern to all fifty states, relative to the adequacy of standards governing judicial conduct	19
2. The two California judicial misconduct standards, on their face and as applied, present substantial vagueness problems under the federal Due Process Clause	25
Conclusion	33
Appendix:	
Order denying rehearing, and opinion of the Supreme Court of California	1a
Report of the Masters	21a

CITATIONS

CASES:

Barsky v. Board of Regents, 347 U.S. 442 (1954)	33
Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673 (1930)	17
Broccolino v. Maryland Commission on Judicial Disabilities, No. 73-431, cert. denied, March 25, 1974	24

Page

Chandler v. Judicial Council, 398 U.S. 74 (1970) 24, 28
Eaton v. City of Tulsa, No. 73-5925 (42 Law Week 3538, March 25, 1974) 33
Friedman v. New York, 397 U.S. 317 (1970) 24
Friedman v. State, 24 N.Y.2d 528 (1969) 20
Gooding v. Wilson, 405 U.S. 518 (1972) 32
Grayned v. City of Rockford, 408 U.S. 104 (1972) ...25, 26
Herndon v. Georgia, 295 U.S. 441 (1935) 17
Lanzetta v. New Jersey, 306 U.S. 451 (1939) 25
Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313 (1930) 17
Napolitano, In re, 401 U.S. 951 (1971) 24
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 18
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 17
Parker v. Levy, No. 73-206 17
People v. Ward, 27 Cal.3d 218, 103 Cal.Rptr. 671 (1972) 27
Secretary of the Navy v. Avrech, No. 72-1713 17
Smith v. Goguen, No. 72-1254 (42 Law Week 4393, March 25, 1974) 25
Smith v. Superior Court, 68 Cal. Rptr. 1, 440 P.2d 65 (1968) 27

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution, Amendment 14, Sec. 1 ... 3
California Constitution, Article VI, Sec. 8 14
California Constitution, Article VI, Sec. 18(c) 3, 12
California Code of Civil Procedure, § 284 27
North Carolina Gen. Stat. § 123-5 (1964) 21
Ohio Rev. Code Ann. § 2701.12 (Supp. 1970) 22

MISCELLANEOUS:

American Bar Association Canons of Judicial Ethics 22
60 A.B.A.J. 227 (1974) 19
Braden and Cohn, The Illinois Constitution: An Annotated and Comparative Analysis (1969) 19
Braithwaite, Who Judges the Judges? (American Bar Foundation, 1971) 20
Frankel, Judicial Discipline and Removal, 44 Tex. L. Rev. 1117 (1966) 20

Page

Frankel, Judicial Discipline and Removal—The California Plan, 58 Ill.B.J. 510 (1970) 20
Hall, Judicial Removal for Off-Bench Behavior: Why? 21 J.Pub.L. 127 (1972) 20
Note, Remedies for Judicial Misconduct: Removal and Discipline of Judges, 41 N.Y.U.L.Rev. 149 (1966) 19
Note, 84 Harv.L.Rev. 1002 (1971) 19, 23, 32
Report of the Commission on Judicial Qualifications to the Governor, 1973 (Feb. 1974) 19
Stern and Gressman, Supreme Court Practice (4th ed. 1969) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

JUDGE LELAND W. GEILER,
Petitioner,

v.

THE COMMISSION ON JUDICIAL QUALIFICATIONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Judge Leland W. Geiler, the petitioner herein, respectfully requests that a writ of certiorari issue to review the opinion and judgment entered in these proceedings on October 25, 1973, by the Supreme Court of California.

OPINION BELOW

The opinion of the Supreme Court of California, dated October 25, 1973, is reported at 10 Cal.3d 270, 110 Cal. Rptr. 201, and at 515 P.2d 1. It is reprinted in the appendix hereto, p. 1a, *infra.*

The unreported findings of the Commission on Judicial Qualifications, dated August 4, 1972, and submitted to the Supreme Court of California on August 29, 1972, are quoted in full in the opinion of the Supreme Court, in footnotes 6 and 7 thereof, thus making unnecessary their reprinting herein. The unreported conclusions and recommendations of the Commission are also adequately identified and described in the Supreme Court's opinion, the major conclusion and recommendation of the Commission being set forth in full in that opinion at pp. 17a-19a, *infra*.

The Report of the Masters, dated July 5, 1972, which is not officially reported, is set forth in the appendix hereto, p. 21a, *infra*.

JURISDICTION

The opinion and judgment of the Supreme Court of California were entered on October 25, 1973. A timely petition for rehearing was entertained by that court and denied on its merits on November 15, 1973. See appendix hereto, p. 1a, *infra*.

On February 4, 1974, on timely application, Mr. Justice Douglas ordered that the time for filing this petition for writ of certiorari be extended to and including April 13, 1974. This petition has been filed within that extended period.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

An elected state court judge has been ordered removed from office by the Supreme Court of California on charges of misconduct involving both his discre-

tionary judicial acts and his personal off-the-bench relationships with other court personnel. Such removal was ordered by application of two standards of judicial misconduct contained in Article VI, Section 18(c), of the California Constitution, to wit, (1) "wilful misconduct in office," and (2) "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

The question presented is whether these California constitutional standards of judicial misconduct, on their face and as interpreted and applied to the alleged misconduct in this case, are impermissibly vague under the principles of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14, Section 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

California Constitution, Article VI, Section 18(c):

"On recommendation of the Commission on Judicial Qualifications the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of his current term that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

STATEMENT OF THE CASE

The petitioner, Leland W. Geiler, was appointed in 1966, by the Governor of California, to serve as a Judge of the Municipal Court for the Los Angeles Judicial District of Los Angeles County. In 1970, he was unopposed for election to this judicial post, and was thus elected to a 6-year term.

This proceeding began on January 21, 1972, when the respondent Commission on Judicial Qualifications filed and served on the petitioner formal charges that, as a Judge, he had engaged in conduct that constituted "willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[1] The specifications of the charges were in six counts, each count containing multiple incidents. These specifications, in general, were:

(1) Count One alleged that the petitioner committed two assaults in the courthouse on the persons of an attorney and a court officer, the two specified incidents being lettered A and B.

(2) Count Two alleged that the petitioner had engaged in a course of conduct in the courthouse, consisting of five specified instances lettered A through E,

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[1] Previously, on March 26, 1971, the Commission on Judicial Qualifications, on its own motion pursuant to Rule 904 of the California Rules of Court, resolved to conduct a preliminary inquiry into the petitioner's judicial conduct. The formal charges, dated January 21, 1972, were made as a result of that preliminary investigation.

Despite his request, the petitioner was never informed by the Commission as to the source of the charges made against him. Nor was petitioner allowed to engage in any sort of discovery procedure prior to the evidentiary hearing before the Special Masters.

"involving the subject of sex which brought the judiciary into disrepute."

(3) Count Three alleged that the petitioner had engaged in a course of conduct, consisting of eight specified instances lettered A through H, "of addressing counsel and court attaches in disparaging, vulgar, and unjudicial terms."

(5) Count Five alleged that, on three specified occasions lettered A through C, the petitioner had "unlawfully ordered the court reporters to delete material from two preliminary hearing transcripts."

(6) Count Six was the most significant charge. It alleged that in nine preliminary hearings (identified by case numbers, defendants' names, dates and names of counsel), petitioner had "arbitrarily and capriciously relieved the public defender and appointed private counsel." This sixth count further alleged that the "defendants in all nine cases were eligible for representation by the Public Defender's Office," and in all these cases "the Public Defender's Office was ready, willing, and able to properly represent the defendant." It was further alleged that the appointed private counsel in these cases then "entered a plea of guilty for the defendant," and in none of these cases "was there an assertion of a conflict of interest."

The petitioner vigorously denied the allegations of misconduct in all six counts, though explaining that on some occasions he may have made "kidding" remarks in talking to court personnel or attorneys in his courtroom. He flatly denied that he had engaged in any assault on the person of any court officer or attorney. As to the critical Count Six, the petitioner's answer alleged that:

(1) The nine specified cases were ones that would have been reduced to a misdemeanor if the defendant had been bound over to the Superior Court.

(2) In all nine cases, the defendant had been confined to jail or otherwise held for a period of time, and would have been bound over to the Superior Court before he could be sentenced. In each case, the defendant had "earnestly requested that he be given the right to plead guilty to a misdemeanor and to be sentenced at that time in the Municipal Court."

(3) In each case, the penalty to be given the defendant for the misdemeanor to which he pleaded guilty in the Municipal Court was approved by the District Attorney and by the defendant.

(4) In each case, the Public Defender had refused to permit the defendant to plead guilty to a misdemeanor in the Municipal Court and had insisted upon having the case transferred to the Superior Court. In no case did the Public Defender "ever give any substantial explanation or reason for attempting to remove the case in that way, except perhaps to perpetuate the activities of the Public Defender in connection with the case."

(5) In each case, the petitioner Judge had arranged with private counsel to accept appointment to represent the defendant without compensation "for the sole purpose of permitting the defendant to enter a plea of guilty in accordance with his choice, and in each such case, private counsel was given opportunity to confer with the defendant to satisfy themselves that the plea was proper and was for the best interests of the defendant."

(6) Finally, the petitioner asserted his belief that, in accepting the guilty pleas, he had acted in the best interests of the defendants and the administration of justice. His actions, he said, had "saved the county thousands and thousands of dollars of unnecessary expense in taking the case up to the Superior Court for the purpose of having the same or substantially the same plea and penalty imposed, but after considerable delay and expense to the defendants." The offices of the District Attorney and the sheriff had congratulated petitioner on his judgment and acts in accepting pleas in such cases "and the defendants have been sometimes pathetically appreciative of this opportunity to expedite their removal from jail and to rehabilitate themselves." No one, asserted petitioner, had ever criticized him for these acts "with the possible exception of the Public Defender's office."

Three Superior Court judges from Los Angeles County[2] were thereafter appointed by the Supreme Court of California to act as Special Masters for the taking of evidence respecting these various charges. The Masters were directed to report their findings and recommendations to the Commission on Judicial Qualifications, which in turn was authorized to report its own findings and recommendations to the Supreme Court.

The hearings before the Masters consumed 21 court days, during which petitioner presented evidence that, if believed, would have compelled dismissal of all the

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[2] Footnote 3 of the opinion below (see p. 3a, *infra*, of the appendix hereto) indicates that only two of the Masters were Superior Court judges. But the third judge, identified in that footnote as a Municipal Court judge, was elevated to the Superior Court before the hearings began.

charges against him. He vigorously denied, for example, that he had physically assaulted anyone, explaining that the incidents in question were simply acts of friendly "humorous horseplay" with court personnel who were in no way offended or injured thereby.[3] Judge Geiler's testimony, supported by that of his bailiff, clearly showed that he had not used vulgar language on any of the occasions described in the Count Three charges; and as to none of those incidents did the prosecution produce any corroborating witnesses.[4]

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[3] The Masters found, as to the so-called "dildo" incident specified in Count One-A, that Judge Geiler's conduct was indeed only "an attempt at what he believed to be humorous horseplay," and that he "did not intend an offensive touching nor a civil or criminal assault." His subsequent courtroom remarks were found to be "not a threatened assault." See appendix hereto, p. 24a, *infra*.

As to the so-called "goosing" incident, Count One-B, the Masters found that the "victim," a friendly court commissioner, had not been offended, and that the incident had not created a scene. No civil or criminal assault was found. See appendix hereto, p. 24a, *infra*. In fact, the commissioner himself, who was the only prosecution witness on this matter, could barely remember the incident, and was not even certain that Judge Geiler was the one who had touched him.

[4] In the course of finding Judge Geiler guilty of making certain offensive remarks about or in the presence of his female law clerk (Mrs. Michael Provencio), as specified in Count Three, the Masters noted that the law clerk had registered no objection until after she had been reprimanded by Judge Geiler and then transferred by him to another division of the Municipal Court. The Masters also noted that the Judge's remarks, to the extent that they were in fact uttered, "were undoubtedly provoked by her [the law clerk's] general demeanor and previous references to her personal sex life." See appendix hereto, p. 28a, *infra*.

To that extent, therefore, the Masters confirmed Judge Geiler's claim that most of the alleged vulgarities were the product of the law clerk's vindictive imagination, and that her own life style and vocabulary were such that she could not have been offended by such remarks, if they were in fact made.

Judge Geiler further testified, as to the Count Six charges, that at all times he had acted in good faith and in a judicious manner, exercising what he conceived to be his sound judicial discretion, by relieving the public defenders and appointing other defense counsel in the specified cases.[5]

The prosecuting examiners, representing the Commission, were unable to present credible testimony to support any of the various charges in Counts Two, Four and Five, and those charges quickly disappeared from the proceedings upon the Masters' findings that these charges were "not proved." See appendix hereto, pp. 25a-36a, *infra*. But the examiners did present evidence, which obviously was believed by the Masters, that at least one of the "assaults" specified in Count One and four of the obscene remarks specified in Count Three had in fact occurred. The other alleged incidents in Counts One and Three were found "not proved."

The examiners also failed in their effort to prove, at least to the satisfaction of the Masters who heard the testimony, that petitioner was guilty of Count Six. The Masters' Report found, from the evidence submitted, that Judge Geiler's actions in the nine speci-

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[5] As the Supreme Court below noted (see p. 13a, *infra*), the Masters found "mutual hostility between petitioner and the public defender's office." The Masters also stated (see p. 39a, *infra*), that "Some members of the Public Defender's Office were quite hostile toward Judge Geiler." It was petitioner's contention that the Count Six charges were the vindictive result of this hostility.

The Commission, however, found that petitioner was responsible for this hostile relationship, and that his substitutions of counsel were "the direct result of petitioner's hostile attitude toward deputy public defenders." See appendix hereto, p. 13a, *infra*.

fied cases "were in good faith and with the intent to dispense substantial justice to both the people and the defendants" and that, "although his actions were arbitrary in some cases, they should not be characterized as capricious because they were made in good faith." See appendix hereto, pp. 40a-41a, *infra.*

The Masters, in recommending that Judge Geiler be censured rather than removed from office, found that of the 23 charges contained in Counts One through Six, only five had been proved—Counts One-B, Three-A, Three-D, Three G, and Three H. See p. 41a, *infra.* The other 18 charges were found either "not proved" or not violative of any misconduct standard, including the whole of Count Six.

On the successive *de novo* considerations of the record by the Commission and by the Supreme Court, the five charges that the Masters found proved were likewise found proved. But the Commission and the Supreme Court disagreed with the Masters as to four other charges that the Masters had found "not proved" —Counts One-A, Three-B, Three-C and Six. Thus, in the findings of the Commission and of the Supreme Court, nine of the 23 charges were considered proved. On that basis, the Commission, by a 7-2 vote, recommended that Judge Geiler be removed from office, rather than censured or reprimanded. And on that same basis, the Supreme Court accepted the Commission's recommendation of ouster, and made its own determination that Judge Geiler be removed from office.

In tabular form, the charges as to which Judge Geiler now stands convicted may be summarized as follows:

	Findings by:		
Charges	Masters	Commission	Supreme Court
One — A	Not Guilty	Guilty	Guilty
— B	Guilty	Guilty	Guilty
Two — A	Not guilty	———	———
— B	No violation	———	———
— C	No violation	———	———
— D	Not guilty	———	———
— E	Not guilty	———	———
Three — A	Guilty	Guilty	Guilty
— B	Not Guilty	Guilty	Guilty
— C	Not Guilty	Guilty	Guilty
— D	Guilty	Guilty	Guilty
— E	Not guilty	———	———
— F	Not guilty	———	———
— G	Guilty	Guilty	Guilty
— H	Guilty	Guilty	Guilty
Four — A	Not guilty	———	———
— B	Not guilty	———	———
— C	Not guilty	———	———
— D	Not guilty	———	———
Five — A	Not guilty	———	———
— B	Not guilty	———	———
— C	Not guilty	———	———
Six	No violation	Guilty	Guilty

Based upon these various findings, the Masters, the Commission and the Supreme Court made their respective recommendations, conclusions and determinations respecting the penalty to be imposed on Judge Geiler. The Masters recommended censure only; the Commission (by a split vote) recommended removal from office; and the Supreme Court independently determined

fied cases "were in good faith and with the intent to dispense substantial justice to both the people and the defendants" and that, "although his actions were arbitrary in some cases, they should not be characterized as capricious because they were made in good faith." See appendix hereto, pp. 40a-41a, *infra.*

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— B	Not Guilty	Guilty	Guilty
— C	Not Guilty	Guilty	Guilty
— D	Guilty	Guilty	Guilty
— E	Not guilty	———	———
— F	Not guilty	———	———
— G	Guilty	Guilty	Guilty
— H	Guilty	Guilty	Guilty
Four — A	Not guilty	———	———
— B	Not guilty	———	———
— C	Not guilty	———	———
— D	Not guilty	———	———
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— B	Not guilty	———	———
— C	Not guilty	———	———
Six	No violation	Guilty	Guilty

Based upon these various findings, the Masters, the Commission and the Supreme Court made their respective recommendations, conclusions and determinations respecting the penalty to be imposed on Judge Geiler. The Masters recommended censure only; the Commission (by a split vote) recommended removal from office; and the Supreme Court independently determined

and ordered that Judge Geiler be removed from office, but "if otherwise qualified [he] be permitted to practice law in the State of California." See appendix hereto, pp. 20a-21a, *infra*.

In reaching these varying recommendations and conclusions, the Masters, the Commission and the Supreme Court all sought to apply to the findings of guilt two of the standards of judicial misconduct specified in Article VI, Section 18(c), of the California Constitution. That constitutional provision authorizes the Supreme Court, on recommendation of the Commission, to censure or remove a state court judge for action that constitutes:

(1) "wilful misconduct in office,"

(2) "wilful and persistent failure to perform his duties,"

(3) "habitual intemperance," or

(4) "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

Only two of those standards, numbered above as (1) and (4), were considered relevant to Judge Geiler's case. And only those two standards were in fact utilized by the three bodies that assessed his conduct.

However, there was significant disagreement among these three bodies as to which of the two standards applied to which action of Judge Geiler. Using again the tabular form, this disagreement can be expressed as follows, using the symbol "(1)" to refer to the standard of "wilful misconduct in office," and the symbol "(4)" to refer to the standard of "conduct

prejudicial to the administration of justice that brings the judicial office into disrepute":

Counts	Masters	Commission	Supreme Court
One-A:	No violations.	Changed to violations of both (1) and (4).	Changed again to a violation of (4) only.
One-B:	Violation of (4) only.	Agreed	Agreed
Three-A:	Violation of (4) only.	Agreed	Agreed
Three-B:	No violations.	Changed to a violation of (4) only.	Agreed
Three-C:	No violations.	Changed to a violation of (4) only.	Agreed
Three-D:	Violation of (4) only.	Agreed	Changed to a violation of (1) only.
Three-G:	Violation of (4) only.	Agreed	Changed to a violation of (1) only.
Three-H:	Violation of (4) only.	Agreed	Agreed
Six:	No violations.	Changed to violations of both (1) and (4).	Agreed as to violations of both (1) and (4), but actions also found "unlawful."

Such, then, was the history of the application to Judge Geiler's actions of the two constitutional standards of judicial misconduct, as applied first by the Masters, then by the Commission and finally by the Supreme Court of California.

RAISING THE FEDERAL CONSTITUTIONAL QUESTION

In making their respective findings and recommendations, the Masters and the Commission were not acting as judicial bodies.[6] Nor were they charged with the judicial function of interpreting the judicial misconduct standards set forth in the California Constitution. They could only read and seek to apply the face of those constitutional standards, there being no prior decision of the Supreme Court that gave any authoritative interpretation of the standards. Thus it was inappropriate, and indeed impossible, for the petitioner to have sought to raise before the Masters or the Commission any federal constitutional questions stemming from a definitive reading of those standards by the Supreme Court, a reading that alone could determine how those standards should be applied to the facts of this case.

As its opinion below reveals, the Supreme Court of California considers itself charged, in judicial misconduct matters, with the independent functions of: (1) deciding the appropriate standards for the Commission to employ in reviewing the Masters' Report, and for the Supreme Court to employ in reviewing the Commission's recommendations; (2) making a detailed *de novo* review of the full record and independently determining whether there was "clear and convincing evidence" to support the Commission's findings; (3) making the Supreme Court's own findings and conclusions in order to render its ultimate and inde-

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[6] Article VI, Section 8, of the California Constitution provides that the Commission on Judicial Qualifications shall consist of 5 lower court judges, 2 practicing attorneys, and "2 citizens who are not judges, retired judges, or members of the State Bar." See footnote 1 of the opinion below, p. 2a, *infra*.

pendent determination whether to censure or remove a judge; and (4) making a definitive interpretation, and application to the facts, of the relevant standards articulated in the California Constitution. See particularly footnote 13 of the Supreme Court's opinion below, at p. 20a, *infra,* of the appendix hereto. In all those four respects, the Supreme Court's decision in this case was novel and unanticipated. It is truly a landmark decision on all these matters.

As indicated, the Supreme Court had not had a prior opportunity to determine the meaning and scope of the two constitutional standards here in question for censuring or removing a state judge from office. Not until its opinion in this case, rendered on October 25, 1973, did the Supreme Court provide any kind of an authoritative gloss to these constitutional provisions. As thus restated and refined in the opinion below, the applicable two standards of judicial misconduct have come to mean as follows:

(1) The standard of "wilful misconduct in office" has been construed "as connoting *something graver than the 'lesser included offense'* of 'conduct prejudicial to the administration of justice that brings the judicial office into disrepute.' " See p. 16a, *infra;* emphasis added. This "more serious charge should be reserved for unjudicial conduct which a judge acting in his judicial capacity commits in bad faith." *Ibid.*

(2) The "bad faith" which has now been said to adhere to this "graver offense" has been interpreted to mean, in the context of the Count Six charges against Judge Geiler and his actions in removing public defenders, the intentional commission of acts "which he knew or should have known were beyond his lawful power." This is now described as "the most insidious

kind of official lawlessness—disregard for the statutory and constitutional rules by which a society of millions and a heritage of centuries have sought to preserve fundamental fairness within a legal system which cannot escape the inherent imperfections of mankind." See p. 19a, *infra.* Thus, under the standard as so construed, petitioner's "bad faith" has been said to be "directed towards our legal system itself; his arbitrary substitutions of counsel because of personal beliefs as to the defendant's guilt and his personal hostility to their counsel smacks of an inquisitorial intent to serve imagined truth at the expense of justice." See p. 20a, *infra.* Such conduct, in short, has been said to be "not only unjudicial but unlawful as well," within the expanded meaning of the first or graver standard. See p. 19a, *infra.*

(3) The "lesser" standard—"conduct prejudicial to the administration of justice that brings the judicial office into disrepute"—has now been interpreted by the Supreme Court to apply to "conduct which a judge undertakes *in good faith* but which nevertheless would appear *to an objective observer* to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." See p. 16a, *infra;* emphasis added.

(4) This second or "lesser" standard has further been said to be applicable as well to "wilful misconduct out of office, i.e. unjudicial conduct committed *in bad faith* by a judge not then acting in a judicial capacity." See footnote 11 of the opinion below, p. 16a, *infra;* emphasis added.

Such are the definitive constructions accorded the California judicial misconduct standards, out of which arise the federal constitutional problems of vagueness.

Since those problems could not effectively have been raised earlier, and since the particular constructions and refinements could not have been foreseen, this becomes one of those rare but classic situations where a petition for rehearing, addressed to the definitive restatement of the standards, is the first and only opportunity to raise the federal constitutional problems before the highest state court. In such a context, this Court has always considered the raising of federal claims for the first time in the petition for rehearing as "timely, since it [the federal claim] was raised at the first opportunity." *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U.S. 673, 677-678 (1930); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U.S. 313, 320 (1930); *Herndon* v. *Georgia,* 295 U.S. 441, 444 (1935), and cases there cited. That is true even though the petition for rehearing be denied without comment. See, generally, Stern and Gressman, Supreme Court Practice 125 (4th ed. 1969).

Thus it was sufficient, in seeking rehearing of the novel decision of the Supreme Court of California, that petitioner did raise federal constitutional objections to the vagueness of the California judicial misconduct standards, as construed. At page 5 of that petition, for example, the petitioner protested that the standards "were so vague and uncertain as to violate the constutional guaranty of due process," citing this Court's decision in *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 168-169 (1972), and the lower courts' decisions in two cases now pending before this Court for decision—*Secretary of the Navy* v. *Avrech,* No. 72-1713, and *Parker* v. *Levy,* No. 73-206. All those cited cases deal with the federal due process implications of the vagueness doctrine.

But the petitioner here did more than protest, by way of the rehearing petition, the novel construction of the judicial misconduct standards contained in the opinion below. In his original brief to the Supreme Court, entitled a Petition for Review, the petitioner had asserted (pp. 9-10, 21, 24) that these standards on their face were vague and uncertain, relying upon federal decisions applying federal due process concepts. He had further asserted in that brief (pp. 13-18) that his removal from office under these standards would invade his First Amendment free speech rights, as well as the due process requirements for removal from public office. Petitioner's reply brief, also filed before the decision below was rendered, repeated (p. 9 ff.) the assertion that the standards were vague and uncertain, and that his free speech rights under the First Amendment had been circumscribed.

Petitioner thus raised, in a timely fashion, federal due process objections to the standards in question, both as written in the California Constitution and as construed by the Supreme Court of California. That court's failure to mention or consider such objections in its written opinion must be taken as a rejection of the claims. This Court, of course, has jurisdiction to review such a rejection of federal constitutional claims. If a federal claim has been properly raised, as was done here, and "[i]f the necessary effect of the judgment has been to deny the claim, that is enough." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises an Important and Novel Constitutional Problem, of Concern to All Fifty States, Relative to the Adequacy of Standards Governing Judicial Conduct.

For certiorari purposes, the decision below is important, unprecedented, and productive of confusion in the vital area of judicial ethics.[7] It presents a square confrontation between the public interest in eliminating the unfit from the bench and the constitutional interest in providing adequate standards to govern judicial conduct and to warn against transgressions thereof.

Drawing the proper constitutional line between these two great interests is not a concern of California alone. All states provide some constitutional form of removal of judges. Forty-six states have impeachment provisions. Twenty-five states provide for some form of judicial commission or tribunal regulating the judiciary. Twenty-eight states allow for address, seven utilize recall, and four provide for a special board.[8] The California removal-discipline system is notable mainly because it is the prototype of the so-called "commission" procedure, whereby a commission has been established

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[7] The decision below by the Supreme Court of California, a highly respected and influential tribunal, has been termed "an unprecedented action" by a commentator in the American Bar Association Journal. 60 A.B.A.J. 227 (1974).

The respondent Commission on Judicial Qualifications itself has proclaimed that in this case "the California Supreme Court for the first time in history removed a judge from office following Commission proceedings." 1973 Report of the Commission on Judicial Qualifications to the Governor, p. 2 (Feb. 1974).

[8] See Braden and Cohn, The Illinois Constitution: An Annotated and Comparative Analysis 375 (1969); Note, Remedies for Judicial Misconduct: Removal and Discipline of Judges, 41 N.Y.U.L. Rev. 149, 175-194 (1966); Note, 84 Harv.L.Rev. 1002, 1008 (1971).

to investigate complaints, hold hearings, make findings of fact, and recommend sanctions to the highest state court, which alone has the power to remove or otherwise discipline a judge.[9]

Thus all fifty states are affected by the federal due process problems created by the California decision below. Whatever their mechanisms for judicial discipline, all the states need to know how generalized they may be in articulating their standards of judicial misconduct before colliding with the vagueness doctrines engrained in the Due Process Clause of the Fourteenth Amendment.

The standards so far erected by the states run the gamut from the most nebulous to the most precise. At the one extreme are those eleven states that rely upon some formulation of the "reasonable cause" prescription as the basis for removal.[10] More than one-third of

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[9] The California Commission on Judicial Qualifications, with jurisdiction over all levels of the state judiciary, was established in 1960. About 24 states follow the California Commission system.

California's "commission" system has been termed one of the four notable systems of judicial discipline among the states, the other three main systems being the New Jersey system of tight court administration, the New York system of a special court on the judiciary, and the Illinois system of a special court-commission. See Frankel, Judicial Discipline and Removal, 44 Tex.L.Rev. 1117, 1128-1130 (1966); Frankel, Judicial Discipline and Removal—The California Plan, 58 Ill.B.J. 510 (1970); Braithwaite, Who Judges the Judges? Ch. 6, 81-95 (American Bar Foundation, 1971).

[10] The eleven states are Kentucky, Louisiana, Michigan, Mississippi, New Hampshire, Nevada, New York, South Carolina, Tennessee, Texas and Washington. This listing, and those that follow in footnotes 11 through 19, *infra.*, is taken from the valuable catalogue of state judicial removal provisions in Hall, Judicial Removal for Off-Bench Behavior: Why? 21 J.Pub.L. 127, 129-131 (1972).

In *Friedman* v. *State*, 24 N.Y.2d 528 (1969), it was said that the "for cause" standard "is no more vague than standards of 'misconduct' . . ."

the states authorize removal for corruption or "wilful misconduct in office"—which is one of the standards in the California Constitution that is involved in this case.[11]

A slightly larger number of states permit the removal of judges for a "misdemeanor in office," [12] which is less restrictive than the provision in several states prescribing ouster for engaging in conduct or committing an offense that involves moral turpitude.[13] Greater specificity is sometimes found in standards defining the criminal or anti-social activity that can lead to ouster, such as conviction of a felony, "habitual drunkenness," "intemperance," "gambling" and illegal use of drugs.[14]

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[11] In addition to California, the other states employing such a standard are Alabama, Indiana, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee, Virginia, Washington and West Virginia.

[12] In this listing are Arizona, Delaware, Florida, Idaho, Iowa, Kansas, Louisiana, Maine, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Rhode Island, South Dakota, Utah, West Virginia and Wyoming.

[13] In that category are found Alabama, California, Colorado, Missouri, Ohio, Oklahoma and Oregon.

[14] North Carolina warns any judge involved in "any criminal matter, the conviction whereof would tend to bring his office into public contempt." N.C.Gen.Stat. § 123-5 (1964).

Removal sanctions for conviction of a felony or of any crime are found in Arizona, Colorado, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Mexico, North Dakota, Pennsylvania, South Dakota.

Removal for a "high crime" is permitted in Arizona, Delaware, Indiana, Louisiana, Montana, Utah, West Virginia and Wyoming.

Drunkenness or intemperance can lead to removal in Alabama, California, Colorado, Florida, Hawaii, Louisiana, Missouri, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Vermont. Gambling is specified by Mississippi, and illegal use of drugs is mentioned by Oregon.

Approaching the other end of the spectrum are the various standards used to assess judges who escape removal sanctions couched in terms of specified criminal conduct. Such standards range from "gross immorality" [15] and "during good behavior" [16] to the more elusive one here employed by California—"conduct prejudicial to the administration of justice that brings the judicial office into disrepute." [17] Of similar caliber are such standards as "conduct unbecoming a member of the judiciary" [18] and "conduct evidencing unfitness for judicial office." [19] Other states have also made violations of the canons of professional or judicial ethics a ground for sanctions against a judicial violator.[20]

The two California standards here involved are at the center of this nationwide mix. The "wilful misconduct in office" standard is used in 18 other states; and

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[15] West Virginia specifies "immorality."

[16] Massachusetts, New Hampshire and New Jersey use "during good behavior."

[17] California's formulation of this standard is also used in Hawaii, Maryland, Pennsylvania, Tennessee, Vermont, and Virginia.

[18] Florida uses this standard.

[19] This formulation is found in New Jersey, Texas and Vermont.

[20] Connecticut and Pennsylvania so provide. Ohio prescribes removal only where the violation of a canon results in a "substantial loss of public respect for the office." Ohio Rev. Code Ann. § 2701.12 (Supp. 1970).

Among the American Bar Association's Canons of Ethics is the following: "*4. Avoidance of Impropriety.* A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of the law; and his personal behavior, not only upon the bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach."

the second standard ("conduct prejudicial to the administration of justice," etc.) is used in six other states. But the constitutional problem created by the decision below affects more than the sufficiency of these two types of standards. The due process requirements of adequate notice have an obvious impact on the formulation and application of all types of standards of judicial misconduct. To what degree of notice are the judicial transgressors entitled, as a matter of federal due process? What policy matters, what delineations of judicial misconduct, does the federal Due Process Clause allow to be delegated to the commission or court that sits in *ad hoc* judgment of particular transgressors?

Strangely enough, those questions are neither asked nor answered in all the vast outpouring of literature during the last decade, literature that has accompanied the establishment of mechanisms for removing from the bench the corrupt and the unfit. With rare exceptions,[21] the emphasis has always been on the need to establish more efficient and more speedy methods for ousting those judges whose actions are thought to discredit the judiciary. Definitions of judicial misconduct seem to have been proposed and adopted with an eye directed more at achieving ease of removal than at insuring against arbitrary removal action.

Like Topsy, the state judicial removal systems have grown during the past decade or two without any internal concerns about due process limitations, and

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[21] The most helpful and penetrating discussion of the problem appears in a case note in 84 Harv.L.Rev. 1002 (1971). That note emphasizes (at 1008) that care should be taken to "insure that a system of judicial discipline will not be expanded into a roving commission for the enforcement of current standards of morality."

without any definitive guidance on the matter from this Court.[22] On but two occasions in the last 10 years has the Court been asked to review, on appeal, the sufficiency of state standards of judicial misconduct. Both appeals asserted that the "for cause" standard, as used in New York and Illinois respectively, was unconstitutionally vague. Both appeals were dismissed for want of a substantial federal question. *Friedman* v. *New York,* 397 U.S. 317 (1970); *In re Napolitano,* 401 U.S. 951 (1971).[23] But neither dismissal order of the Court pretended to provide any guidelines for the state removal systems. Neither order can rightly be treated as this Court's blanket approval of any and all state judicial misconduct standards, however vague and uncertain they may be.

The time has now come for this Court to explore this important and recurring due process problem. As the legitimate drive to cleanse the judiciary of the unfit continues unabated, this Court must determine if there are any due process limitations to that program. Are state court judges to be exempt from the established due process requirement that *all persons* "be informed

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[22] In *Chandler* v. *Judicial Council,* 398 U.S. 74 (1970), this Court held that a federal judge, who had been relieved of many of his duties by the Judicial Council for the Tenth Circuit on a finding that he had not discharged his duties efficiently, was not entitled to file mandamus or prohibition in the Supreme Court because other relief was still open to him in the tribunals below. That decision has no bearing on the standards for administering state standards of judicial misconduct.

[23] On March 25, 1974, this Court denied certiorari in *Broccolino* v. *Maryland Commission on Judicial Disabilities,* No. 73-431. But the petition in that judicial removal case complained only of the procedure employed before the Commission, and said nothing of the standards employed.

as to what the State commands or forbids"? *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939). Are the states now free, in ousting their judges from the bench, to ignore the federal due process command that a state "establish minimal guidelines to govern law enforcement"? *Smith* v. *Goguen,* No. 72-1254 (42 Law Week 4393 at 4396, March 25, 1974). Are the states free, in other words, to resolve their judicial misconduct problems "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application [of judicial removal standards]"? *Grayned* v. *City of Rockford,* 408 U.S. 104, 109 (1972).

2. The Two California Judicial Misconduct Standards, on Their Face and as Applied, Present Substantial Vagueness Problems Under the Federal Due Process Clause.

Out of the opinion below, with its in-depth discussion of the two California standards of judicial misconduct, emerge several factors that justify the grant of certiorari in this case. The substantial nature of the constitutional due process problems are made fully evident from that opinion. Moreover, a dark cloud of confusion and vagueness is cast by the opinion over the scope and applicability of two standards of judicial misconduct that are widely employed throughout the nation. And the court's application of both standards to condemn actions heretofore deemed solely within the realm of judicial power and discretion constitutes a new and dangerous threat to the independence of the judiciary in California and elsewhere.

Such certiorari factors become even more evident when the discussion of these standards in the opinion below is read against the backdrop of the *Grayned* trilogy of constitutional values that are said to be of-

fended by any vague state law or standard of conduct. *Grayned* v. *City of Rockford,* 408 U.S. 104, 108-109 (1972). Those values, said the Court, are:

(a) The freedom of man to steer between lawful and unlawful conduct. That value is offended by laws that give a person no reasonable notice or opportunity to know what is prohibited, so that he may act accordingly.

(b) The application of laws in a non-arbitrary and non-discriminatory manner. That value is offended when the laws fail to provide "explicit standards" to guide those who must enforce and apply the law, allowing them to resolve what are basically policy matters on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application of the laws.

(c) The uninhibited exercise of basic First Amendment freedoms. That value is offended where a vague statute abuts upon those First Amendment areas, its uncertain meanings causing citizens to steer far wider of the unlawful zone than if the boundaries of that zone were clearly marked.

Viewed against those three constitutional values, the judicial misconduct standards employed by California in this case reveal vagueness problems of a most disturbing nature.

A. The standards as applied to judicial conduct

The core of the decision below is found in its application of the two standards to the judicial action taken by Judge Geiler in replacing public defenders, who refused to accede to their clients' wishes to plead guilty, action which he deemed to be within his power and discretion

and to be in the best interests of those defendants. But in assessing the constitutional propriety of such an application, one must ask the following questions:

(1) Do the phrases "wilful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" provide any meaningful warning or notice, on their face, that erroneous or bad faith execution of judicial power is within their reach? In common judicial parlance, is judicial error equated with judicial misconduct? Or is judicial error, be it egregious or committed in bad faith, to be left to the normal corrective processes of the appellate system? And in answering that latter question, one must note that California jurisprudence does provide full appellate correction of the type of judicial error ascribed to Judge Geiler.[24]

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[24] The California Supreme Court held that Judge Geiler, in ordering a change of defense counsel, violated § 284 of the California Code of Civil Procedure, which has been construed to deprive a trial judge of the power to decree a change of defense counsel without the consent of both the defendant and counsel, or without an application having been made by either the defendant or counsel, after notice from one to the other.

But as indicated in *Smith* v. *Superior Court*, 68 Cal. Rptr. 1, 440 P.2d 65 (1968), and *People* v. *Ward*, 27 Cal. 3d 218, 103 Cal. Rptr. 671 (1972), any judicial action taken in violation of § 284 can be reviewed and corrected on appeal, or by mandamus. The *Ward* decision also indicates that such a judicial error does not always result in a deprivation of a defendant's constitutional right to counsel, or require a reversal. Any such error, moreover, can be waived by a defendant. *Ibid.*

Contrast the conclusion of the Masters, all three of whom were experienced judges in California, with respect to Count Six: "We conclude that Judge Geiler did not violate any statute when he relieved the Deputy Public Defenders in the nine cases, nor is there any analogous precedent or authority to guide a judge faced with the specific problems presented by these nine cases." See p. 40a, *infra*.

(2) If, as the court below held, the "graver" offense of "wilful misconduct in office" means "unjudicial conduct which a judge acting in his judicial capacity commits in bad faith" (see p. 16a, *infra*), has not the second of the *Grayned* trilogy of constitutional values been offended? Does that formulation of the standard mean anything more than that the judicial enforcers of the standard can decree the removal of a judge if they conceive his judicial action to be so "unjudicial" and so much in "bad faith" as to warrant their subjective condemnation? Since what is "unjudicial" and done in "bad faith" is only in the minds of those whose duty it is to assess the judicial action of the accused, are not "the attendant dangers of arbitrary and discriminatory application of the laws" encouraged if not virtually assured? Does the removal process, based on an evaluation of the unjudicial nature of the judicial action in question, merely substitute a subjective and wide-ranging assessment for the objective and narrow assessment that marks the normal appellate review of such action?

If those questions are answered in the affirmative, then truly the ruling below constitutes a most serious threat to the independence of the judiciary. Judicial freedom is properly circumscribed only by the judge's own sense of judicial values and by the potential of objective review and correction by appellate authority. But to subject the judicial function to *ad hoc* subjective review, accompanied by the threat of censure or removal, is to intimidate all judges toward conformity, and to make them fearful to exercise all the judicial freedom that may rightfully be theirs, controversial though it may be. To borrow Mr. Justice Black's dissenting words in *Chandler* v. *Judicial Council*, 398 U.S. 74, 143 (1970), unless such subjective review is "in

some way repudiated, the hope for an independent judiciary will prove to have been no more than an evanescent dream."

(3) To the extent that the court below has applied both standards to Judge Geiler's judicial conduct involved in Count Six, have not the confusion and vagueness been exascerbated? How can the same judicial action be labeled "in bad faith" under the "graver" standard of "wilful misconduct," while being described (see p. 16a, *infra*) as undertaken "in good faith" for purposes of the "lesser included offense" of conduct prejudicial to the administration of justice?

(4) To the extent that Judge Geiler's "bad faith," under the "graver" offense, has been described as, (a) a "disregard for the statutory and constitutional rules by which a society of millions and a heritage of centuries have sought to preserve fundamental fairness," (b) "directed toward our legal system itself," and (c) smacking of "an inquisitorial intent to serve imagined truth at the expense of justice" (see pp. 19a-20a, *infra*), has the court below expanded the "bad faith" part of the "graver" standard beyond the horizons of due process notice requirements? How can any judge be advised to tailor his judicial activities so as to avoid disregarding the governing rules "of a society of millions"? What badge of faith must he assume to avoid offending "our legal system itself"?

B. The standards as applied to personal conduct

Out of the original 22 charges of personal misconduct, only eight survived the prosecutors' burden of proof. See chart on page 11, *supra*. Those eight charges, of course, are of a highly prejudicial and shocking

nature, being particularly embarrassing to the petitioner as his protestations of innocence were ignored. But the sole problem now is the extent to which either or both of the California standards of judicial misconduct gave any forewarning that such conduct might come within their ambit. The substantiality of that constitutional problem is revealed by the following questions:

(1) Is not the vague thrust of the two standards indicated by their inconsistent application by the three enforcing agencies below to five of the eight personal misconduct charges? Does not such inconsistency reflect the highly subjective and *ad hoc* nature of those standards? In answering these questions, one must first observe the following crazy-quilt treatment of the five charges:

(a) Count One-A, the so-called "dildo" incident, was found by the Masters not to be condemned by either standard. The Commission, viewing the same facts, found that Judge Geiler had violated both standards. Yet the Supreme Court concluded that the incident was condemned only under the "graver" or "wilful misconduct" standard.

(b) Counts Three-B and Three-C, involving obscene remarks to the female law clerk, were not found in the Masters' minds to be violative of either standard. Yet the Commission and the Supreme Court readily found a violation of the "lesser" standard of "conduct prejudicial to the administration of justice."

(c) Counts Three-D and Three-G, involving obscene remarks to female court personnel, were thought by the Masters and the Commission to show violations

of the "lesser" standard. Not so, said the Supreme Court. Those incidents were thought by the court to constitute "wilful misconduct."

(2) Is not the vague nature of these two standards further demonstrated by their totally inconsistent application to five personal misconduct charges that involved substantially identical facts? Counts Three-A, Three-B and Three-C all alleged that obscene remarks were made outside the courtroom to female court personnel, and all were found by the Supreme Court to involve violations of the lesser "prejudicial conduct" standard. Yet, without explanation, the Supreme Court applied the graver "wilful misconduct" standard, with all its bad faith connotations, to precisely the same type of alleged utterances to female court personnel that constituted Charges Three-D and Three-H. How can such differing treatment be explained other than through the *ad hoc* and subjective reactions of the Supreme Court enforcers, reactions that can and apparently do differ even as among identical fact situations?

(3) The ultimate question that tests the vagueness of these standards, as applied to Judge Geiler's alleged conduct and utterances off the bench, is whether and to what extent these standards forewarn a judge as to what personal off-the-bench conduct may warrant censure or removal. Has a judge, upon reading the words "wilful misconduct" or "personal misconduct," been told that he dare not exercise outside the courtroom the full panoply of his First Amendment rights? Has he been told that he dare not, on pain of censure or removal, utilize what others may consider "vulgar and even profane language," language that he himself has no reason to believe "would be offensive or in any way

disruptive of courtroom decorum"? See concurring opinion of Mr. Justice Powell in *Eaton* v. *City of Tulsa* No. 73-5925 (42 Law Week 3538, March 25, 1974).[25]

If judicial misconduct standards are to be used to impinge upon the privacy of a judge's off-the-bench speech or conduct, it would appear constitutionally requisite that the standards themselves be narrowly and precisely drawn to accomplish that purpose, in a manner that does not invade or chill constitutionally protected acts, speech or privacy. See *Gooding* v. *Wilson,* 405 U.S. 518, 522 (1972). Felix Frankfurter once wrote that a man does not cease to be himself, nor does he change his character, when he dons a judicial gown. By the same token, a man should not be deemed to lose his right, upon ascending the bench, to speak candidly and perhaps even vulgarly when off-the-bench circumstances reasonably so warrant. But at least if that freedom is to be validly circumscribed in the name of judicial ethics, the circumscribing should be in precise and unmistakable language.[26]

In sum, it appears that the constitutional vice of the two California judicial misconduct standards is that the discretion of defining their intrusion into the private utterances and off-the-bench conduct of judges is left

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[25] Mr. Justice Powell further noted in that concurrence that "[l]anguage likely to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances."

[26] It has been suggested that, as a general rule, "the more closely related misconduct is to the judicial function, the less specific need be the standards." Note, 84 Harv. L. Rev. 1002, 1008 (1971). Conversely, the further removed the misconduct is from the judicial function, and the more personal or non-judicial is the off-the-bench misconduct, the more specific should be the standards.

to the judicial enforcers of those standards. Cf. *Barsky* v. *Board of Regents*, 347 U.S. 442, 448 (1954). The enforcers thus must do more than match the measure of discipline to the specific case. They must also make their own *ad hoc* and subjective evaluations of what intrusions shall be made in the name of "wilful misconduct" or "prejudicial conduct." Such evaluations are what the Due Process Clause was designed to preclude.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D. C. 20036
Counsel for Petitioner

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